A. THE *ORDER* FAILS TO GIVE PROPER WEIGHT TO THE FIRST AMENDMENT INTERESTS IMPLICATED BY THE CPNI RULES

1. CPNI Is Information Whose Communication Is Subject to First Amendment Protection

CPNI is information whose communication is entitled to First Amendment protection. The creation, assembly, compilation, and/or communication of information lie at the core of what the First Amendment protects. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636-37 (1994).

It is fundamental that the First Amendment protects the right to use information to communicate with others. CPNI is valuable commercial information and an essential ingredient for communication between carriers and their millions of customers regarding not just the current service relationship but also regarding new and innovative services that customers may desire or find useful. In this respect, CPNI is to carriers what wire service reports are to newspapers — *i.e.*, the raw source material from which information and communications are crafted. In the case of CPNI, the information is communicated from one speaker to another within the carrier (*i.e.*, from one division or affiliate to another), and also forms the source of protected expression to customers.

The Supreme Court has applied the First Amendment to regulations falling on *physical* objects and substances (let alone bits or clusters of information) that are essential ingredients in expression, such as the newsprint and ink that were the subject of the tax invalidated by the Supreme Court in *Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581 (1983), and the newsracks regulated by the laws struck down in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426-29 (1993), and *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988).

Furthermore, the First Amendment protects not only a speaker's right to solicit customers, *Edenfield v. Fane*, 507 U.S. 761, 765-66 (1993), but also the audience's right to *receive* information. *Lamont v. Postmaster General*, 381 U.S. 301 (1965). With respect to both dimensions of the right to free speech, CPNI is information that is central to meaningful communication and well-informed customer decisions. It is precisely the kind of information that the Supreme Court has described as being the lifeblood of a free enterprise economy:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) ("*Virginia Pharmacy*"). *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995). Indeed, in other proceedings the FCC has frequently cited to *Virginia Pharmacy*, recognizing that "[t]he proper allocation of resources in our free enterprise system requires that consumer decisions be intelligent and well informed," *In the Matter of Billed Party Preference for InterLATA 0+ Calls*, 13 FCC Rcd. 6122 ¶ 18 (1998), and that the "dissemination of information as to who is producing and selling what product, for what reason, and at what price" is critical information for consumers. *In the Matter of Unsolicited Telephone Calls, Memorandum Opinion and Order*, 77 FCC 2d 1023, 1035-36 ¶ 32 (1980). Nowhere in the *CPNI Order* did the FCC so much as pay even lip service to these cardinal principles.

2. A Prior Consent Requirement for CPNI Is an Unconstitutional Burden on Speech

The *CPNI Order* unquestionably burdens speech. It prohibits carriers from using CPNI to market services outside the existing service relationship unless prior affirmative consent by customers is first obtained. For example, "a carrier whose customer subscribes to service that includes a combination of local and CMRS would be able to use CPNI derived from this entire service to market to that customer all related offerings, *but not to market long distance service to*

that customer, because the customer's service excludes any long distance component." *CPNI Order* at ¶ 30 (italics added). Thus, carriers are forbidden from using CPNI without prior affirmative customer consent to discuss with customers various categories of services that the customer may need or desire. If prior affirmative consent cannot be obtained, the *CPNI Order* bans the use of CPNI to tailor the communication.

In addition to the barrier the *CPNI Order* imposes on carrier-customer communications, it also restricts the right of common corporate affiliates and divisions, and of personnel within the same carrier, to share CPNI — to communicate information to each other.[54] These restrictions are imposed despite otherwise express congressional authority permitting local carriers to engage in joint marketing — to market as a single package local phone service together with other services that might be offered or managed through a separate affiliate or division, such as long distance and wireless services. *See* 47 U.S.C. § 601(d) (granting carriers joint marketing authority "[n]otwithstanding . . . any . . . Commission regulation"); 47 U.S.C. § 272(g)(3) (excluding joint marketing activities from certain identified non-discrimination obligations). By preventing carriers' separate divisions or affiliates from communicating CPNI to each other, even where Congress has explicitly granted the right for those divisions or affiliates to engage in joint marketing, the *CPNI Order* operates as a classic restriction on speech.

Accordingly, scholars have warned that "[r]egulations intended to protect privacy by outlawing or restricting the transfer of consumer information would violate rights of free speech." Solveig Singleton, *Privacy as Censorship: A Skeptical View of Proposals to Regulate Privacy in the Private Sector* at 3 (Cato Institute Policy Analysis No. 295, Jan. 22, 1998). "From light conversation, to journalism, to consumer credit reporting, we rely on being able to

[54] The FCC's CPNI rules provide: "If a telecommunications carrier provides different categories of service, but a customer does not subscribe to more than one offering by the carrier, the carrier is not permitted to share CPNI among the carrier's affiliated entities." 47 C.F.R. § 64.2005(a)(2). The rules also forbid a carrier from "disclos[ing] or permit[ting] access to CPNI" with regard to the provision of services "that are within a category of service to which the customer does not already subscribe to from that carrier, unless the carrier has customer approval to do so." *Id.* at § 64.2005(b).

freely communicate details of one another's lives. Proposals to forbid businesses to communicate with one another about real events fly in the face of that tradition." *Id.* at 1. *See also* Fred H. Cate, PRIVACY IN THE INFORMATION AGE 55 (Brookings 1997) (the First Amendment "fundamentally blocks the power of the government to restrict expression, even in order to protect the privacy of other individuals. . . . [The First Amendment] restrains the power of the government to control expression or to facilitate its control by private parties in an effort to protect privacy.").

In a variety of contexts, the Supreme Court has recognized that imposing a prior affirmative consent requirement in the context of otherwise protected communications is an unconstitutional burden on speech. For example, in *Martin v. Struthers*, 319 U.S. 141 (1943), the Court invalidated a city ordinance that forbade door-to-door solicitation unless the residents of the household had affirmatively requested the solicitor to approach. The Court opined that "[w]hether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants." *Id.* at 141. Here, the FCC has attempted to make the decision for all telecommunications customers in the entire United States.

Similarly, in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the Court invalidated a requirement that the recipients of Communist literature notify the Post Office in advance that they wish to receive it. Most recently, in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996), the Supreme Court struck down an affirmative opt-in rule for "patently offensive" cable programming. The Court opined that "[t]hese requirements have obvious restrictive effects" (*id.* at 2391), even apart from the reluctance of customers to order offensive material for viewing. *Id.* The Court predicted that "[f]urther, the added costs and burdens that these requirements impose upon a cable system operator may encourage that operator to ban programming that the operator would otherwise permit to run[.]" *Id.*

The *CPNI Order* is similarly unconstitutional because it impermissibly burdens speech. It imposes onerous prior affirmative consent requirements on information sought to be communicated internally, within a carrier, in support of protected speech with customers. The CPNI rules violate the rights of both speakers and listeners.

3. The Commission's First Amendment Analysis Was Flawed

The FCC did not engage in a conscientious First Amendment analysis. Instead, it tried to sweep the First Amendment issues under the rug. The FCC's theory was that, under its rules, "[c]arriers remain free to communicate with present or potential customers about the full range of services that they offer, and [its interpretation of] section 222 therefore does not prevent a carrier from engaging in protected speech with customers regarding its business or products." *CPNI Order* at ¶ 106. According to the Commission, no speech was burdened, let alone prohibited.

This reasoning is sophistry. First, the Commission completely overlooked the ban on a carrier's internal or corporate use of CPNI — on CPNI-related communications between various divisions and personnel within the same carrier. That ban on speech is in no way alleviated by allowing carriers the option of non-CPNI-related communications with customers.

Second, the Commission's argument flies in the face of the Supreme Court's teaching that the First Amendment is concerned with "practic[al]" realities. *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977). Without the use of CPNI, carriers cannot engage in customized or individualized speech with their customers. The FCC's approach relegates carriers to types of "broadcast" speech, when communication with their customers as individuals is much more meaningful, informative, and effective. The "broadcast speech" option cannot save the *CPNI Order* from its clear constitutional infirmities. As the Supreme Court has explained in striking down a ban on paid petition circulators, the fact that a regulation "leaves open 'more burdensome' avenues of communication, does not relieve its burden on first Amendment expression. The First Amendment protects [the speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so." *Meyer v.*

Grant, 486 U.S. 414, 424 (1988). Similarly, in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), the Supreme Court struck down a state rule banning targeted solicitation letters by attorneys to potential clients known to have specific legal problems (in that case, persons facing foreclosure actions). The Court held that "the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable." *Id.* at 473-74.

Thus, a law prohibiting newspapers from using wire service reports could not be saved by arguing that newspapers remained free to publish stories using other kinds of source materials. In *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993), the Court invalidated a ban on in-person solicitation by CPAs (*i.e.*, a type of individualized and targeted speech), even though the regulation allowed accountants to solicit by mail or advertisement (*i.e.*, a type of broadcast speech). In *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995), the Court struck down a federal statute that prohibited the disclosure of alcohol content on beer labels (targeted speech), even though the statute permitted such disclosure in advertisements (broadcast speech). And, in a situation resembling the converse of the FCC's *CPNI Order*, it was no answer to the newsrack ban invalidated in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (a type of "broadcast" ban), that commercial leaflets might be distributed by hand (a type of individualized speech).[55]

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[55] *See also City of Ladue v. Gilleo*, 512 U.S. 43, 57 & n.16 (1994) (prohibition on residential signs invalid, even though it did not prevent homeowners from "taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign," or even from displaying flags with written messages); *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 708-09 (1992) (Kennedy, J., concurring in the judgment) ("the Port Authority's regulation allows no practical means for advocates and organizations to sell literature within its airports"); *id.* at 715 (Souter, J., concurring in the judgment in relevant part) ("A distribution of preaddressed envelopes is unlikely to be much of an alternative.").

Here, the practical burden on speech is no less severe than those restrictions struck down by the Supreme Court. The FCC did not deny that its interpretation of Section 222 might "constrain carriers' ability to more easily 'target' certain customers for marketing." *CPNI Order*. at ¶ 106. The Commission recognized the importance of CPNI, agreeing that "the use of CPNI may facilitate the marketing of telecommunications services to which a customer does not subscribe." *Id.* at ¶ 104. Indeed, in the FCC's own words, "as competition grows and the number of firms competing for consumer attention increases, CPNI becomes a powerful resource for identifying potential customers and tailoring marketing strategies to maximize customer response." *Id.* at ¶ 22.

The FCC also acknowledged that "the form of approval has bearing on carriers' use of CPNI as a marketing tool" for new services. *Id.* at ¶ 86. The Commission did not, and could not, dispute that requests for affirmative consent have extremely low response rates. In fact, the FCC itself pointed to the U S WEST trial to show that U S WEST's outbound mail campaign produced affirmative consents in the range of 6-11% and that only about 29 percent of customers give their consent when "cold called" by a carrier. *Id.* at ¶ 111.

Thus, the FCC acknowledged that its *Order* "might make incumbent carriers' marketing efforts less effective and potentially more expensive" (*id.* at ¶ 66) and cited comments indicating that "restricting intra-firm use of CPNI makes product development and marketing more costly and less efficient, thereby raising prices and reducing the quality and variety of service." *Id.* at n.244. Indeed, "[d]evelopments in Europe, where regulations strictly limit the transfer of personal information, suggest that a mandatory opt-in regime would nearly wipe out direct marketing." *Supra at 26*, Solveig Singleton, *Privacy as Censorship*, at 12-13.

Moreover, even the obligation to *seek* prior affirmative consents (even if they could be obtained) itself imposes severe burdens on carriers. Making repeated unsolicited calls and other communications to subscribers to seek consent risks losing customer goodwill. Indeed, the FCC acknowledged that "[c]arriers that make frequent outbound calls to obtain oral approval . . . do so at the risk of losing their customer base." *CPNI Order* at ¶ 113. For carriers like U S WEST,

BellSouth and SBC, which collectively have over 91 million access lines and wireless subscribers, such a campaign would also be extremely labor-intensive, expensive, and lengthy. Speech would be suppressed for a significant amount of time, and the carriers would undoubtedly refrain from speech in situations where they otherwise would seek to communicate. In fact, U S WEST's study documented that the *CPNI Order* would prevent it from using the vast majority of its customer records to communicate with its subscribers and would impose enormous costs on U S WEST — running into the hundreds of millions of dollars — through attempts to secure customer affirmative CPNI consents, if the consents could be obtained at all.

Hence, the Commission's assertion that its *CPNI Order* does not burden speech is fanciful. In fact, it burdens speech so greatly as to make CPNI-supported expression utterly impracticable.

4. The *CPNI Order* Cannot Not Survive First Amendment Scrutiny

The Commission asserted that, even if expression is burdened, its prior affirmative consent requirement amounted at most to a restriction on commercial speech that passes muster under intermediate First Amendment scrutiny because "the government asserts a substantial interest in support of the regulation, the regulation advances that interest, and the regulation is narrowly drawn." *CPNI Order* at ¶ 106. This conclusory claim does not suffice.

Under even intermediate First Amendment scrutiny,[56] a restriction on speech must be invalidated unless the Government **bears its burden** of demonstrating that the law "directly

[56] Commercial speech is defined as speech which proposes a commercial transaction. *See Virginia State Board. of Pharmacy*, 425 U.S. at 762. CPNI communications within a carrier itself — such as internal communications between different personnel or divisions within the same carrier — do not merely propose commercial transactions. Rather, they convey raw, factual information stemming directly from the service relationship. Such communications are thus entitled to full and undiluted First Amendment protection, rather than merely the intermediate scrutiny triggered by restrictions on commercial speech. However, because the *CPNI Order* cannot survive even intermediate scrutiny, *a fortiori* it could not pass muster under full First Amendment scrutiny.

advances" a "substantial interest" and "is no more extensive than necessary." *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1509 (1996) (plurality opinion). In recent years, the Supreme Court has repeatedly struck down restrictions on commercial speech under this standard. *See Liquormart*, 116 S. Ct. at 1509-10; *id.* at 1521 (O'Connor, J., concurring); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487-90 (1995); *Ibanez v. Florida Dept. of Business & Professional Reg.*, 512 U.S. 136, 142-44 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416-17 (1993); *Edenfield v. Fane*, 507 U.S. 761, 767-68 (1993); *see also Revo v. Disciplinary Bd. of the Supreme Court of the State of New Mexico*, 106 F.3d 929, 935-36 (10th Cir.), *cert. denied*, 117 S. Ct. 2515 (1997).

The *CPNI Order* should similarly be invalidated, because the Government cannot meet its burden here.

a. The FCC Cannot Demonstrate the Existence of a Substantial Governmental Interest

The Supreme Court has instructed that "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfeld v. Fane*, 507 U.S. 761, 770-71 (1993). That burden "is not satisfied by mere speculation or conjecture," *id.* at 770, or by "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing*, 514 U.S. at 490.

In this case, the FCC did not even articulate with any precision the privacy interest sought to be advanced. Nor did it deny that its *CPNI Order* will actually result in more invasions of customer privacy and solitude. If carriers cannot identify and communicate with individual customers based on their likely interest in receiving information about specific new services, they will be forced (in those instances where they do not remain silent) to use blanketed "broadcast-type" telemarketing speech fashioned for an "all customer" audience — the very sort of solicitations that the FCC itself has branded a nuisance. *See CPNI Order* at ¶ 113 (unsolicited telemarketing can be a nuisance); *BNA Third Order on Reconsideration*, 11 FCC Rcd. 6835,

6848-49 ¶ 23 (1996) ("unsolicited marketing contacts are in fact a nuisance, and we may take notice of this fact").

Even if the FCC could articulate a privacy interest in this case, it would be unduly speculative. The Commission itself has repeatedly and extensively documented, over many years, that an affirmative consent requirement is not needed to protect either customer privacy or competitive equity, and that there are many benefits to consumers from permitting CPNI to be used by carriers without prior affirmative consent. *See* pp. 7-8, *supra*. Without exception, reviewing courts have upheld the Commission's determinations. Further, the record demonstrates that use of service relationship or account information to discuss services, including "out of category" services, is consistent with customer expectations and that customers trust carriers to protect their privacy. *See* pp. 7-8, 12-15, *supra*. In fact, carriers with existing customer relationships have every incentive to cultivate customer goodwill and honor their customers' wishes. Moreover, expert agencies well versed in privacy issues have concluded that a prior affirmative consent requirement for individually-identifiable information such as CPNI is unnecessary and unwise. *See* pp. 18-19, *supra*.

Even in the *CPNI Order*, the FCC acknowledged that customer approval "can be *inferred* in the context of an existing customer-carrier relationship" in some circumstances. *CPNI Order* at ¶ 23 (emphasis in original). Thus, the FCC agreed "that Congress recognized . . . that customers expect carriers with which they maintain an established relationship will use information derived through the course of that relationship to improve the customer's existing service" (*CPNI Order* at ¶ 54); that there are no significant privacy concerns with respect to the sharing of CPNI within an integrated firm (*CPNI Order* at n. 203); and that "customers expect their carriers to offer related offerings within the total service to which they subscribe." *Id.* at n. 372; *see also* n. 206. Inexplicably, however, the FCC insisted that customer marketing expectations did not "extend to all of a carrier's available service offerings." *Id.* at n.372. The

Commission could cite no evidence to support this hair-splitting assertion. And its micro-managing cannot be squared with the central "deregulatory"[57] thrust of the 1996 Act.

The FCC's defense of the *CPNI Order* thus rests on the kind of impermissible speculation that cannot suffice under intermediate scrutiny. In *Turner Broadcasting*, a plurality of the Court explained that, even when Congress makes "unusually detailed" factual findings that "are recited in the text of the Act itself," 512 U.S. at 632, 646, in a First Amendment case a reviewing court is obligated to exercise "independent judgment" to ensure that the Government has "demonstrate[d] that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 665, 666. The cable must-carry rules were adopted by Congress along with extensive factual findings made in the text of the statute itself. In addition, the Court noted that the factual development on remand had yielded "a record of tens of thousands of pages" of evidence. *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174, 1185 (1997) (*Turner II*) (internal quotation omitted). The Court stressed that there was a "substantial basis to support Congress' conclusion that a real threat justified enactment of the must-carry provisions." 117 S. Ct. at 1190. The Court pointed to "specific support" for Congress' conclusion (*id.*): "substantive evidence" and "contemporaneous stud[ies]" regarding market structure and market power exercised by cable operators (*id.* at 1192-93); and "[e]mpirical research in the record before Congress" (*id.* at 1195).

In contrast, here the FCC cannot show any articulated or detailed congressional findings to support its position. Based on its position in the *CPNI Order*, the FCC will no doubt argue here that Congress, in adopting Section 222, essentially rejected the rationale underlying the Commission's prior CPNI regulations. But if the FCC's newly prescribed CPNI rules had truly been intended by Congress, one would expect — given their unprecedented nature — some discussion of the significance of a prior affirmative consent requirement in the legislative history

[57] Joint Statement of Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

of Section 222. But no such discussion exists. The absence of such legislative history is equivalent to "the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (citing A. Conan Doyle, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES 335 (1927)).

And even if there had been some type of congressional expression of dissent with the FCC's previous regulatory approach, Congress may not by fiat override First Amendment rights simply by declaring existing administrative schemes inadequate. That much is clear from the Supreme Court's decision in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), which invalidated a federal "dial-a-porn" statute and rejected Congress' unsupported assertion that the FCC's previous rules were inadequate to protect minors. The Court held that, "[b]eyond the fact that whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law, our answer is that the congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors." *Id.* at 129. The Court noted that "[the legislative] record contains no evidence as to how effective or ineffective the FCC's most recent regulations were or might prove to be," but only "conclusory statements" regarding the FCC's rules. *Id.* at 129-30. Here the legislative record does not contain even such "conclusory statements."

The FCC cannot establish the existence of a substantial governmental interest in this case.

b. The CPNI Rules Are Not Narrowly Tailored to Any Substantial Governmental Interest

Even if the Government could assert a substantial interest here, the *CPNI Order* would not be a narrowly tailored means of advancing it. A notice-and-opt-out rule, which enables a customer to request that CPNI pertaining to him not be used to contact him, gives the customer ample means to protect his privacy without trenching on speech. The FCC, along with other expert agencies, has previously documented in detail the wisdom of such a "do not disturb" policy, which is the constitutionally required solution. *See Martin*, 319 U.S. at 148. The notice-

and-opt-out approach is a familiar device in Fed. R. Civ. P. 23 class actions and other situations even when grievous personal injury, huge financial stakes, or other issues of great moment are at stake. It is certainly an obvious and simple alternative in the case of telephone company CPNI.

The proven availability of a notice-and-opt-out rule in this context demonstrates that the stringent approach taken in the *CPNI Order* is not narrowly tailored to the asserted interest. *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1510 (1996) ("It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the [Government's] goal[.]"); *Rubin v. Coors Brewing*, 514 U.S. at 490 ("We agree that the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the statute] is more extensive than necessary."); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 & n.13 (1993) (considering possible alternatives to restriction on speech); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566, 570 (1980) (government must make showing "that a more limited restriction" on speech "would not serve adequately the [governmental] interests").

The *CPNI Order* and the accompanying rule amendments are not narrowly tailored to any substantial governmental interest and are therefore invalid.

B. THE *ORDER* FAILS TO GIVE PROPER WEIGHT TO THE FIFTH AMENDMENT PROPERTY INTERESTS IMPLICATED BY THE CPNI RULES

The *CPNI Order* also raises grave constitutional issues under the Takings Clause of the Fifth Amendment. The Commission stripped carriers of their property interest in CPNI altogether by declaring that "to the extent CPNI is property . . . it is better understood as belonging to the customer, not the carrier." *CPNI Order* at ¶ 43.

The FCC implemented this pronouncement by imposing a prior affirmative consent requirement for carrier use of CPNI outside existing service categories. As already noted, such customer veto power on carriers' ability to use CPNI for productive (indeed, constitutionally

protected) purposes will have a devastating effect. In short, the *CPNI Order* denies carriers the ability to use their valuable property in order to promote the supposed social policies favored by the Commission.

Fifth Amendment analysis must begin with the Supreme Court's decision in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), which held that the Takings Clause protects stored data and that the government's use of private proprietary research data constituted a compensable taking. Similarly, an appropriation of a carrier's proprietary commercial business information pertaining to its transactions with its customers amounts to a taking. As one scholar has concluded in the context of customer information, "[a] legislative, regulatory, or even judicial determination that denies processors the right to use their data could very likely constitute a taking and require compensation. . . . [F]or the billions of data files currently processed and used by U.S. individuals and institutions, a dramatic alteration on user rights makes a compelling case for the existence of a taking." Cate, PRIVACY IN THE INFORMATION AGE, *supra*, at 74.

The FCC's decree that CPNI belongs to customers, not carriers, does not avoid the takings principle. Rather, it *underscores* the constitutional violation. The Government may not divest a private person of his property "by ipse dixit. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The FCC "may not sidestep the Takings Clause by disavowing traditional property interests[.]" *Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925, 1931 (1998). In *Phillips*, the Supreme Court held that interest earned on client funds in IOLTA accounts is "private property" of the client, notwithstanding a state's attempt to deem the interest to be public property. In the same way, the FCC may not decree that carriers no longer own their customer information. *See also Preseault v. ICC*, 494 U.S. 1, 20 (1990) (O'Connor, J., joined by Scalia and Kennedy, JJ., concurring) (opining that federal agency could not override state-law entitlements by deeming reversionary interests preempted under federal law).

In this case, it is clear that CPNI belongs to a carrier, not to the customer. The telephone company, not its customers, owns its property. "The relation between the company and its

customers is not that of partners, agent and principal, or trustee and beneficiary." *Board of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 31 (1926). "Customers pay for service, not for the property used to render it....By paying bills for service, they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company." *Id.*; *see also Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 22 n.1 (1986) (Marshall, J., concurring in the judgment); *Simpson v. Shepard*, 230 U.S. 352, 454 (1913) (a utility's "property is held in private ownership").

CPNI is a record of the subscription for service which is provided and delivered over the *carrier's* network. CPNI is gathered, organized, maintained, and stored by carriers, not by customers. If a third party were to break into a carrier's computers and steal CPNI, it would be the carrier (and not individual subscribers) who would have a cause of action for conversion. The Commission did not deny that CPNI is "commercially valuable to carriers." *CPNI Order* at ¶ 2. The Commission itself explained that carriers "view CPNI as an important asset of their business" and "hope to use CPNI as an integral part of their future marketing plans." *Id.* at ¶ 22.

For the carriers who have spent billions of dollars accumulating CPNI on the settled understanding that they owned it, the FCC's proclamation that the property now belongs to customers upsets investment-backed expectations that the Takings Clause protects. *Monsanto*, 467 U.S. at 1005; *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Indeed, the Supreme Court recently warned that "statutes should not be construed in a manner that would impair existing property rights," because doing so "can deprive citizens of legitimate expectations and upset settled transactions." *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2151 (1998) (plurality opinion) (internal quotation omitted). In *Eastern Enterprises*, the Court held that a federal coal miner health benefit statute could not be applied retroactively, with a plurality finding the law an impermissible taking, rather than an appropriate regulatory initiative, because of "the economic impact of the regulation, the extent to which the regulation interferes with investment-backed

expectations, and the character of the governmental action." *Id.* at 2146 (internal citation omitted).[58]

That CPNI pertains to the purchasing characteristics of customers does not give them a property interest in it. Even personal data like telephone numbers, addresses, social security numbers, and medical history — let alone records of purchases and economic transactions — are almost always owned by someone else: the Post Office, the government, a bank, or a physician or hospital.[59] A surveillance camera outside a bank or department store may capture the image of persons entering or leaving the establishment without their permission. The resulting footage belongs to the bank or the store, not to the customers, even though their images are depicted in it. 17 U.S.C. §§ 101-06. In the same way, "[a] data processor exercises property rights in his data because of his investment in collecting and aggregating them with other useful data. It is the often substantial investment that is necessary to make data accessible and useful, as well as the data's content, that the law protects." Cate, PRIVACY IN THE INFORMATION AGE, *supra*, at 74. As one noted scholar has observed, "the expand[ing] protection for commercial information reflects a growing awareness that the legal system's recognition of the property status of such information promotes socially useful behavior" and therefore encourages reliance by data processors. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 469 (1991).

To hold that customers rather than carriers own CPNI would have revolutionary implications for a panoply of service companies, such as credit card companies, mail order catalogs, direct marketing companies, and other databases housing comparable consumer

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[58] Justice Kennedy, concurring in the judgment and dissenting in part, would have applied the same factors as a matter of substantive due process.

[59] The Supreme Court has held that individuals have no reasonable expectation of privacy in the telephone numbers dialed from their phones, *see Smith v. Maryland*, 442 U.S. 735 (1979), or even with respect to checks and deposit slips used in banking. *United States v. Miller*, 425 U.S. 435, 443 (1976); *see also California Bankers Ass'n v. Schultz*, 416 U.S. 21, 69-70, 73-76 (1974) (upholding numerous banking transaction recordkeeping and reporting requirements).

information. The assets these companies have developed through the investments of billions of dollars would be wiped out. And if personal information is property of the customer, then the implication is that the "owner" must give permission for every use or collection of the information (personal address books and Rolodex files, for example), not just commercial uses. The consequences of the FCC's pronouncement are as staggering as they are unanalyzed by the Commission.

The Commission tried to defend its CPNI restrictions by maintaining that its *Order* "does not deny all economically beneficial use of property." *CPNI Order* at ¶ 43 (internal quotation). But the *Order does* destroy the value of that portion of the CPNI as to which consumer consents cannot be obtained. It may no longer be used for communications between corporate affiliates and divisions, or for communications with customers for new services outside the existing service relationship. Further, the Supreme Court has repeatedly rejected the FCC's argument that a regulation that does not take every last stick in a bundle of property rights cannot be a taking. In *Hodel v. Irving*, 481 U.S. 704 (1987), for example, the Court struck down a federal statute restricting the ability of Native Americans to pass certain undivided fractional interest in land to their heirs by intestacy or devise, even though they retained full beneficial use of the property during their lifetimes as well as the right to convey it inter vivos. The Court explained that "[t]he fact that it may be possible for the owners of these interests to effectively control disposition upon death through complex inter vivos transactions such as revocable trusts is simply not an adequate substitute for the rights taken, given the nature of the property." *Id.* at 716. In *Babbitt v. Youpee*, 117 S. Ct. 727 (1997), the Court reaffirmed this holding and invalidated an amended version of the same statute. The Court rejected the Government's contention that the statute satisfied the Constitution's demand because it did not diminish the owner's right to use or enjoy property during his lifetime, and did not affect the right to transfer property at death through non-probate means. The Court opined that "[t]hese arguments did not persuade us in *Irving* and they are no more persuasive today." *Id.* at 733.

The FCC's argument was also rejected in *Ruckelshaus*, where the Court specifically noted that the data submitted with a pesticide application has a variety of uses to the producer. *See* 467 U.S. at 1012 ("That the data retain usefulness for Monsanto even after they are disclosed — for example, as bases from which to develop new products or refine old products, as marketing and advertising tools, or as information necessary to obtain registration in foreign countries — is irrelevant to the determination of the economic impact of the EPA action on Monsanto's property right.").

Here, the *CPNI Order's* severe burden on carriers' ability to use CPNI to market new categories of services raises such serious Fifth Amendment questions that it should be invalidated.

C. THE *ORDER* IS A GRATUITOUSLY SEVERE CONSTRUCTION OF SECTION 222

In light of the serious constitutional questions presented by the FCC's interpretation of Section 222, the FCC was bound to construe the statute to avoid those constitutional questions. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[60]

When, as here, an administrative interpretation raises such constitutional concerns, the agency's construction of the statute is not entitled to deference. *Edward J. DeBartolo Corp.*, 485 U.S. 568 at 574-577; *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742-743 (1983). In particular, the deference ordinarily afforded administrative action under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), is wholly inapplicable here. *See Bell Atlantic Corp. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

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[60] *See also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (construing statute in light of First Amendment question "to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress"); *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506-507 (1979); *Machinists v. Street*, 367 U.S. 740, 749-750 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

Further, an agency's failure "to give adequate consideration" to constitutional objections to agency action is "the very paradigm of arbitrary and capricious administrative action." *Meredith Corp. v. FCC*, 809 F.2d 863, 865, 874 (D.C. Cir. 1987).

The need for clear congressional authorization is especially urgent where administrative action raises takings issues, for "[w]hen there is no authorization by an act of Congress or the Constitution for the Executive to take private property, an effective taking by the Executive is unlawful because it usurps Congress's constitutionally granted powers of lawmaking and appropriation." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113 (1985); *see also United States v. Security Indus. Bank*, 459 U.S. 70, 78, 82 (1982) (rejecting construction of statute that would raise taking questions); *Western Union Tel. Co. v. Pennsylvania R.R.*, 195 U.S. 540, 569 (1904) (statutes are not read to delegate power to take property unless they do so "in express terms or by necessary implication"). Thus, in *Bell Atlantic Corp. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), the Court of Appeals invalidated certain FCC rules in order to avoid a takings issue. The court held that Congress had not clearly granted the FCC the authority to take private property for public use and that the Commission was therefore forbidden from adopting regulations that "directly implicate[d] the Just Compensation Clause of the Fifth Amendment." *Id.* at 1445.

The same analysis is dispositive here, for the Commission's *CPNI Order* flouts all of these principles of restraint. The *Order* raises serious constitutional questions. Yet nowhere is there clear statutory language compelling the FCC's interpretation of Section 222 — much less an unmistakably plain congressional intent to impose such stringent CPNI rules. Indeed, the Commission itself confessed that the word "approval" was "ambiguous" (*CPNI Order* at ¶ 87), and that the statutory issues were sufficiently unclear that a "clarification of section 222" was necessary. *CPNI Order* at ¶ 14. The FCC acknowledged that, "while section 222(c)(1) requires customer approval for carrier use of CPNI outside the scope of sections 222(c)(1)(A) and (B), it does not expressly state the form of this approval." *CPNI Order* ¶ 91; *see also id.* at ¶ 86 ("section 222(c)(1) does not specific what kind of approval is required"). Indeed, the words

"prior," "express," or "affirmative" do not appear in Section 222(c)(1). By contrast, Section 222(c)(2) refers to an "affirmative" request. "When Congress uses explicit language in one part of a statute . . . and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing." *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984).

There were numerous reasons that the Commission could and should have interpreted "approval" to include authorization pursuant to a notice-and-opt-out arrangement (for use of CPNI by carriers with existing relationships with the customers in question) rather than requiring only prior affirmative customer consent in order to avoid the constitutional issues raised by the *Order*:

• "Approval" can easily and reasonably be inferred in the context of an existing customer-carrier relationship. That is why the Commission adopted a "total service" approach that would permit a carrier providing both local and cellular service to a customer to use for marketing and speech purposes the CPNI from either service, *without seeking prior consent*:

> [T]he language of section 222(c)(1)(A) and (B) reflects Congress' judgment that customer approval for carriers to use, disclose, and permit access to CPNI can be *inferred* in the context of an existing customer-carrier relationship. This is so because the customer is aware that its carrier has access to CPNI, and, through subscription to the carrier's service, has implicitly approved the carrier's use of CPNI within the existing relationship.

CPNI Order at ¶ 23 (emphasis in original). In the same way, approval can be inferred across service categories in the context of an existing customer-carrier relationship, especially when the customer is given an opt-out opportunity.

• Section 222(c)(1) uses the term "approval." The word "approve" "in its strictest etymological construction, is an after-the-fact ratification." *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Company*, No. A 96-CA-397 SS, at 9-10 (W.D.Tex. 1996). In fact, the FCC itself cited a dictionary definition of "approve" as meaning

"ratify." *CPNI Order* ¶ 91 n.336. A notice-and-opt-out process is therefore a permissible way of ascertaining customer "approval."

• The FCC construed Section 222(c)(1) in a manner compelled by neither the language of the statute nor its legislative history, and in a manner at odds with the Commission's own long-standing position that requiring prior CPNI authorizations from customers was impracticable and unnecessary, and would result in substantial denials of consents due to customer inertia and confusion. There is no indication that Congress in the 1996 Act sought to depart so dramatically from this longstanding regulatory practice.

• Indeed, in light of the significant differences between Section 222 and earlier legislative proposals, it is plain that Congress specifically did *not* mandate affirmative consents from customers. Section 222 was based on S. 652 and H.R. 1555, which, in turn, emerged from a series of House bills proposed by Rep. Edward Markey. H.R. 3432, for example, would have required an "affirmative request" from the customer before a local exchange carrier could use CPNI beyond certain specified purposes. H.R. 3626, the next legislative proposal, expanded the scope of the proposal to all carriers. It also *removed* the word "affirmative" and substituted the word "approval." The legislative history thus suggests that Congress meant *not* to require "affirmative" customer consent in Section 222(c)(1).

• Furthermore, Congress itself acknowledged that customers want "one-stop shopping."[61] Moreover, to facilitate the integrated marketplace of the future, Congress explicitly granted telecommunications carriers joint marketing authority with respect to long distance,[62] electronic publishing,[63] and wireless services.[64] Joint marketing necessarily entails speech about different

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[61] *See* Senate Report on S.652 (Report No. 104-230) at 22-23 ("the ability to bundle telecommunications, information, and cable services into a single package to create 'one-stop-shopping' will be a significant competitive marketing tool" such that BOCs and their affiliates should be permitted to jointly market services).

[62] 47 U.S.C. § 272.

[63] 47 U.S.C. § 274.

[64] 47 U.S.C. § 601.

products and services, and the formulation of any such speech requires CPNI. As the FCC has acknowledged, "joint marketing . . . necessarily involves sharing of some customer network information." *Universal Card Order*, 8 FCC Rcd. at 8787 ¶ 27. There is nothing in Section 222 to suggest that Congress meant to erect an insurmountable barrier to communications about those services it allowed to be jointly marketed.

• The *CPNI Order* is utterly unprecedented. In situations ranging from credit cards to mail order catalogs to grocery purchases, companies are generally free to do whatever they wish with respect to individually-identifiable information generated in the course of the commercial relationship. Where regulations do exist (typically involving more sensitive information than is at issue in this case), they fall far short of the stringent rules adopted by the FCC here. For example, cable operators are allowed to use subscriber information for their own business purposes and are required to obtain written or electronic consent (*i.e.*, affirmative approval), *only* to share subscriber information with unaffiliated third persons. 47 U.S.C. § 551(c)(1). Under the 1996 Consumer Credit Reporting Reform Act, credit reporting agencies may furnish consumer credit information for marketing credit or insurance opportunities to consumers, so long as the agency establishes a toll-free number so that consumers can call and opt out by having their names removed from lists for direct marketing purposes. 15 U.S.C. § 1681b(c)(5). The Uniform Health Care Information Act, adopted by the National Conference of Commissioners on Uniform State Laws, *see* 9 U.L.A. 475 (1988 & Supp. 1992), creates an opt-out scheme for certain disclosures of medical information *Id.* at §§ 2-103, 2-104. The Driver's Privacy Protection Act of 1994 requires states to allow drivers to opt out of having personal motor vehicle information released. 18 U.S.C. § 2721(b)(11)-(12). Numerous states have adopted opt-out statutes for release of other public records information.[65] Even the Video Privacy Protection Act of 1988, adopted in response to the disclosure of the list of videos rented by Supreme Court nominees,

[65] Privacy & Legislative Associates Letter at 14.

allows disclosure of data about customer viewing habits for marketing purposes if the consumer has been given an opportunity to opt out. 18 U.S.C. § 2710(b)(2)(D).

In short, the universal legal baseline is that customers are not viewed as having the kind of privacy or property interests in commercial proprietary information that would grant them a legally enforceable right to veto transmission of the information to third parties, much less presumptively to deny the use of that information by the entity that created it. It is untenable to suppose, as did the FCC, that Congress would have intended so casually to depart from this baseline without comment beyond the choice of the word "approval."

• In issuing the *CPNI Order*, the Commission substituted its own (clearly revisionist) notions of "customer expectations" for solid record — including expert —evidence,[66] departed from long-standing Commission precedent, and disregarded the recommendations of agencies far more expert in the matter of customer privacy than the Commission. The FCC imposed its prior affirmative consent requirement in disregard of statistically valid public opinion survey evidence in the record documenting that customers trust their existing telecommunications carriers, expect CPNI to be used to market products and services of all types with them, and are even more comfortable with this use of CPNI when it is accompanied by a notice and opt out procedure. Although the Commission sought to dismiss this empirical evidence, the criticisms it offered were off-base[67] and flew in the face of the FCC's **own directive** to carriers regarding the

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[66] *Compare In the Matter of Petition to Promulgate a Rule Restricting the Advertising of Over-the-Counter Drugs on Television*, 62 FCC 2d 465, 468 n.11 (1976) (noting the FCC's lack of "claim to expertise in the field of behavioral research" and observing that "research focusing on emotionally and politically charged issues" "should best be left to independent organizations which are expert in such matters and have no direct responsibility for . . . regulation").

[67] The Commission claimed that one of the questions in the Westin study "refers to the examination of records by customer service representatives as 'normal' and implies that the representative will be looking only at the services the customer has before offering new services" and not more sensitive information "such as destination-related information." *CPNI Order* at ¶ 62. But the question carried no such implication. It stated: "[W]hen you call your local telephone company to discuss your services, the customer service representative that you speak with normally looks up your billing and account service record." *Id.* at n. 227 (quoting the question). The description of what a service representative "normally" does is accurate (*i.e.*,

importance of market survey evidence in fashioning arguments and crafting educated regulatory decisions.[68]

The Commission made no attempt to construe Section 222 in a manner that would avoid the constitutional questions under the First and Fifth Amendments. It devoted a **total of six paragraphs** (out of an *Order* containing 261 paragraphs) addressing the constitutional issues raised by petitioners.[69] By itself, this approach was an abuse of discretion and warrants vacating the *CPNI Order*.

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looks up the service record and, if appropriate, the billing record), and the reference to "billing information" clearly implies call-detail information, contrary to the Commission's assumption.

[68] *See In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, *Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd. 10674, at ¶ 49 (1997)(chastising AT&T and other commentors for failure to "cite to any relevant market research supporting their claims of consumer indifference or opposition" to proposed regulatory requirement); *In the Matter of The Revision of Programming and Commercialization Polices, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, MM Docket No. 83-670, 98 FCC 2d 1076, ¶ 64 (1984) (noting approvingly the "empirical data" previously outlined by the FCC in its Notice of Proposed Rulemaking).

[69] The total might be increased by two paragraphs if one counts the paragraphs in which the FCC paraphrased the position of the commenters.

CONCLUSION

The petition for review should be granted; the *CPNI Order* and accompanying rule amendments to 47 C.F.R. §§ 64.2005 and 64.2007 should be vacated; and the matter should be remanded to the FCC for further consideration.

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August 13, 1998

STATEMENT REGARDING ORAL ARGUMENT

Petitioner and Intervenors request oral argument. This case presents free speech and takings questions with national significance, as well as important questions of statutory interpretation that are of first impression. Petitioner and Intervenors believe the Court would find oral argument helpful in reaching its decision.